

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL

BEFORE THE HONORABLE DONNA M. RYU, MAGISTRATE JUDGE

IN RE: LITHIUM ION BATTERIES) NO. C 13-MD-2420 YGR
ANTITRUST LITIGATION)
) MDL No. 2420
) Pages 1 - 43
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Oakland, California
Thursday, April 28, 2016

TRANSCRIPT OF ELECTRONICALLY RECORDED PROCEEDINGS

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Proceedings reported by electronic/mechanical stenography;
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Thursday, April 28, 2016

11:46 a.m.

ELECTRONICALLY RECORDED PROCEEDINGS

THE CLERK: Calling C-13-2420YGR, In Re lithium antitrust litigation.

Counsel, please state your appearances.

(Pause in the proceedings.)

THE CLERK: Please approach the podium and state your appearances, counsel.

MR. SHEANIN: Good morning, Your Honor. Aaron Sheanin from Pearson Simon and Warshaw for direct purchaser class plaintiffs.

THE COURT: Good morning.

MR. AMATO: Good day, Your Honor. Jeffrey Amato from Winston & Strawn for the Panasonic and Sanyo defendants.

Good to see you.

THE COURT: Good morning.

Okay. I know there's other counsel in the case here in the courtroom, and we have their appearances on the sign-up sheets, so we'll just move forward.

I'm going to assume that Mr. Amato and Mr. Sheanin are presenting argument today.

MR. SHEANIN: Yes, Your Honor.

MR. AMATO: Yes.

THE COURT: Okay. Great.

So same rule applies, need to identify yourself each time.

1 **UNIDENTIFIED SPEAKER:** Sure.

2 **THE COURT:** I want to start with the nomenclature
3 question 'cause it is a little confusing, Mr. Sheanin.

4 **MR. SHEANIN:** Okay.

5 **THE COURT:** What I got was a joint letter that had
6 four depo notices attached to them. I didn't actually get the
7 document requests.

8 The depo notices have a -- They're 30(b)(6) depositions, so they
9 have a lot of different subject areas, some of which,
10 Mr. Sheanin, your clients have carved out as objectionable.

11 But when I look at them, they seem to arguably capture
12 more than just traditional downstream data. So for example,
13 they talk about activity that would -- that the DPP has with
14 suppliers, which I think of as more potentially upstream.

15 So what are you calling "downstream data"?

16 **MR. SHEANIN:** We are calling downstream data anything
17 that relates to sales, sales practices, sales policies,
18 pricing, et cetera. There are --

19 **THE COURT:** Going downstream.

20 **MR. SHEANIN:** Yes, I apologize. Aaron Sheanin for
21 the record.

22 **THE COURT:** Okay.

23 **MR. SHEANIN:** Going downstream.

24 **THE COURT:** Okay.

25 **MR. SHEANIN:** Documents pertaining to or deposition

1 testimony pertaining to purchases from the defendants,
2 obviously that is fully relevant. We produced material on it.
3 We're prepared to testify about that.

4 We are prepared to testify about -- Well, let me back up.
5 There are issues about other third-party vendors, their
6 upstream sales, that we question the relevance on.

7 However, for 30(b)(6) purposes, I believe we're prepared
8 to testify generally about those kinds of purchases.

9 And I think certain documents have been produced relating
10 to those vendors. Certain ones, we've -- we may not have
11 produced. But the issue as far as I understand with respect
12 to this particular motion goes to the sales policies,
13 practices, marketing, distribution, as -- data as well as
14 documents and other testimony.

15 **THE COURT:** Well, with the following further
16 statement, that those are directed downstream.

17 **MR. SHEANIN:** Correct.

18 **THE COURT:** So those are looking at transactions from
19 the DPP's and their customers.

20 **MR. SHEANIN:** Correct.

21 **THE COURT:** Okay.

22 So I'm not going to concern myself with the following
23 things. I'm not going to concern myself with the fact that
24 the subject areas that you're complaining about arguably go
25 beyond that, and so maybe some of that is -- is discoverable,

1 but that's not before me, so I'm not going to -- you can meet
2 and confer about that.

3 I'm also going to rule out of bounds the fact that the
4 parties are still talking about cost-plus contracts,
5 competitive intelligence information, and the production of
6 documents that have been assembled in other proceedings, such
7 as the Ritz bankruptcy and Circuit City information in the *LCD*
8 case and the *CRT* case.

9 Those I all understand to be in meet-and-confer, so I'm
10 putting those aside. If you -- If there's problems down the
11 road, then I'm sure you'll raise them with me. But those
12 sound like they're still in progress.

13 **MR. SHEANIN:** I think that's accurate, Your Honor.

14 **MR. AMATO:** Jeffrey Amato for defendants.

15 I do agree that those are in meet-and-confer discussions,
16 but we're at a point here in this litigation where our
17 oppositions to class certification are due on May 24th. And
18 so I mean, subject to what Your Honor's rulings are today, I
19 would -- I would think that this -- this issue needs to be
20 resolved very quickly because -- and it really highlights the
21 problem with the plaintiffs taking an absolute bar to anything
22 they deem to be downstream discovery.

23 It's really giving us a lot of trouble getting the
24 evidence we need to put in our oppositions, which are, you
25 know, less than a month away.

1 **THE COURT:** Okay. So that sounds like a need to have
2 the parties move quickly on those outstanding issues that are
3 not before me today.

4 So are -- where are the parties in their meet-and-confer
5 on documents that were produced in *LCD* or *CRT* for Circuit City
6 or in the bankruptcy proceedings that may not be -- I don't
7 know if they're burdensome to produce, but they seem like they
8 may be in a different category than what's before me today.

9 **MR. SHEANIN:** Sure, Your Honor.

10 Aaron Sheanin again for the direct purchaser plaintiffs.

11 We represent Circuit City, and so I'm prepared
12 specifically to talk about them and I'm happy to talk about
13 the others, but let me focus on Circuit City first.

14 **THE COURT:** Okay.

15 **MR. SHEANIN:** Circuit City produced something like
16 26 -- in excess of 26,000 documents in this case that were
17 related to the direct purchaser -- to the discovery that was
18 at issue in this case.

19 They pertained to batteries. They pertained to other
20 things relating to our purchases, et cetera.

21 Circuit City also in a -- in *LCD* and in *CRT* was an
22 individual opt-out case. They had direct purchaser claims.
23 And they had indirect purchaser claims. And they produced in
24 those actions, which we were not counsel for in those cases,
25 something like 165,000 for each action.

1 It's a fairly overlapping set of documents but not
2 exclusively or entirely overlapping.

3 Those documents exist. However, they address not only
4 purchase issues for those products but also sales issues that
5 relate to those and other products and policies, et cetera,
6 which we contend certainly in this case are not appropriate
7 and are out of bounds and are irrelevant.

8 Now, the defendants have asked us for that information.
9 And they said please produce it here, which is a little odd to
10 us because it's not the type of specific document request, a
11 request with specificity that one would normally get in this
12 type of litigation, and it's not about the same products.
13 It's not about entirely the same issues.

14 What we said, however, was, tell us -- you've seen these
15 documents because counsel for Toshiba, for example, was
16 counsel for Toshiba in all of those cases. They've seen these
17 documents. We said, tell us what specifically you're
18 interested in. We're happy to look at those. We'll meet and
19 confer with you about them.

20 What they said to us in response was, we want the entire
21 universe. We want the entire production.

22 Now, the entire production clearly does not relate to all
23 of the issues that are at stake. But we're happy to meet and
24 confer about a reasonable set of documents.

25 They say there are 200 documents that really matter

1 because they relate to competitive intelligence issues, for
2 example, that we think pertain both to *CRT* and to *Lithium Ion*
3 *Batteries*. Great. We're happy to talk about that.

4 **THE COURT:** Okay. So here's what we're going to do.
5 On those outstanding issues, I agree, Mr. Amato. We need to
6 queue these up quickly because you've got an opposition that's
7 due soon.

8 But to give you some -- some guidance, some -- assuming
9 that the facts are as Mr. Sheanin just described them, that
10 there's a body of documents that were produced by Circuit City
11 in -- for -- as an IPP and also DPP in the *LCD* litigation and
12 that there's, you know, over a hundred thousand of them and
13 some of them have to do with relevant issues here, some of the
14 same products --

15 **MR. BLACK:** Your Honor, could I just respond to that
16 briefly? This is Andrew Black for -- representing Toshiba
17 Corporation.

18 **THE COURT:** Okay. Sure.

19 **MR. BLACK:** So I'm counsel that's been involved in
20 the meet-and-confers. So I start off just by saying that
21 we've been meeting and conferring about this for many months
22 and going back and forth with letters. We've asked for a
23 meet-and-confer date many times over the phone and have not
24 been given a date, so --

25 **THE COURT:** Well, I'm about to give you one.

1 **MR. BLACK:** Okay. I would also say that it's not
2 exactly accurate that the -- many of the products are not the
3 same. The products are in fact the same as the *LCD* case with
4 the exception of televisions.

5 So these are about -- we're talking about notebook
6 computer. We're talking about camcorders. We're talking
7 about digital cameras. We're talking about MP3 players.
8 These are all the same products that were at issue in *LCD*.
9 These are the same products that Circuit City claimed on in
10 *LCD*. The only product that's different are televisions.

11 **THE COURT:** Okay. So I don't want to hear an
12 advanced argument --

13 **MR. BLACK:** Okay.

14 **THE COURT:** -- because we don't have time. I want to
15 get to the issues that are in front of me today. But I want
16 to give you some guidance, and I want to turn this around
17 quickly.

18 If -- If I'm asked to enforce a document request that
19 says, give us everything that was produced in *LCD*, I'm never
20 going to enforce that because you haven't shown that it's
21 relevant. It needs to be relevant and proportional.

22 So when you're meeting and conferring, you know, keep
23 those things in mind. If you're going to make more specific
24 requests of Circuit City, you'll need to say, here are the
25 following documents that we think are relevant here and not

1 hard to produce and, you know, otherwise fall within the
2 proportionality factors that are now in Rule -- right up front
3 in 26(b).

4 Mr. Sheanin, on -- on your client's part, that's sort of
5 the same thing. If it's something that's relevant here,
6 that -- and because it is -- because they seem like they've
7 already been produced there's probably less of a burden
8 argument than -- than there might otherwise be in terms of
9 trying to collect the information.

10 They're going to have an easier showing on that than might
11 otherwise be the case. That's the ground rules here.

12 The -- I'm sure there's something in between you all can
13 agree on, but if you can't, then I want a joint letter by
14 Wednesday. Okay?

15 **MR. BLACK:** Yes.

16 And could I just add, Your Honor? This -- This set of
17 documents. We're not talking about a few documents here.
18 We're talking about -- about 165,000 documents, about 650,000
19 pages, and the majority of which are relevant and the majority
20 of which are responsive to discovery requests that we've
21 already issued in this case and they should have been produced
22 already.

23 **THE COURT:** Well, we'll see.

24 **MR. BLACK:** Okay.

25 **THE COURT:** Again, I don't need to have a preview of

1 the argument because I don't have it in front of me. I think
2 I can do a better job if you actually queue it up -- and, you
3 know, with a joint letter after you've talked so I can
4 understand with more granularity what the questions are.
5 Okay?

6 **MR. BLACK:** Okay.

7 **THE COURT:** So hold your fire on that.

8 **MR. BLACK:** Okay.

9 **THE COURT:** Save it for Mr. Sheanin.

10 I want -- The Ritz issue, same deadline, so please let
11 Ritz counsel know --

12 Is that person here?

13 **MR. SHEANIN:** Ritz counsel -- Mr. Hammarskjold --

14 **THE COURT:** Okay. So, Mr. Hammarskjold, same -- same
15 deadline.

16 Everybody meet and confer so we can get that sorted out
17 and -- and so get your motion on, if there is one, by next
18 Wednesday. Okay?

19 So as to competitive intelligence and cost-plus contracts,
20 those were also carved out as part of the meet-and-confer.
21 Okay.

22 Are -- Are those -- Should I give you the same deadline?
23 Are you making any headway on that?

24 **MR. SHEANIN:** Well, what I would -- I would say --

25 Aaron Sheanin, Your Honor.

1 What I would say is I don't think there's an issue on
2 cost-plus contracts. We're prepared -- I don't believe there
3 are any. We're prepared to produce something if such exists.
4 If they know of one and want to show it to me, I'm happy to do
5 that because we recognize that that is certainly
6 within *Hanover Shoe* and *Illinois Brick*. I have no problem
7 producing that.

8 As far as competitive intelligence, we have carved -- we
9 are prepared to testify at deposition or a 30(b)(6) deposition
10 next week for Circuit City on competitive intelligence issues,
11 certainly at least generally.

12 To the extent that it goes into absolute specific pricing
13 problems or pricing issues, that may be something that we're
14 discussing here in court a little bit later.

15 As to additional competitive intelligence documents, what
16 I think -- we have said that we're prepared to produce
17 competitive intelligence documents to the extent they relate
18 to lithium ion batteries and lithium ion battery products.

19 Defendants have said we think that they relate to
20 absolutely everything in the entire universe or the way
21 Circuit City or Ritz Camera operated in total.

22 To some extent I think maybe the depositions will sort of
23 shed some light on that. But to another extent, if there are
24 specific documents, again, from the prior productions the
25 defendants think would be beneficial on this issue, I am

1 prepared to look at those documents and to tell them that, if
2 it's makes sense, it should come in. And if it doesn't, it
3 shouldn't. Or -- Or we would dispute that, and obviously it'd
4 be resolved.

5 **THE COURT:** Okay. So same deadline for
6 competitive -- I think what you're saying is hold on until the
7 depositions are done to see what else there -- what else we might
8 argue about.

9 But I don't know that there's time for that. I mean --

10 (Simultaneous colloquy.)

11 **THE COURT:** Go forward.

12 **MR. SHEANIN:** The depositions are Wednesday and
13 Thursday of this coming week, Your Honor.

14 **THE COURT:** Okay. Well, we're going to -- I'm going
15 to give you, then, to Friday to file any joint letter on
16 competitive intelligence and cost plus just because there may
17 be something that gets sorted out through the depositions
18 that's helpful.

19 But we still need to keep this on a short timeline. Okay?

20 **MR. SHEANIN:** Of course.

21 **MR. AMATO:** Thank you, Your Honor.

22 **THE COURT:** Okay.

23 So turning to what's in front of me, the first question --
24 well, defendants have articulated two theories of relevance
25 for the downstream data at issue here.

1 The first theory is that it's relevant to the IPP
2 overcharge case. And I -- I'll tell you, I'm not inclined to
3 produce -- order production on that because as was articulated
4 in -- in the *Vitamins* case and in this district in *LCD* and
5 *ODD*, just because the DPP's and IPP's are in the same case
6 doesn't mean that you can force that kind of discovery on the
7 DPP's in order to support what is absolutely relevant in the
8 IPP case. And I couldn't find a single case that stood for
9 that proposition.

10 I think it's burdensome, especially at the level of detail
11 that defendants are looking for here, so I would not order
12 production on that basis.

13 Mr. Amato, if you want to argue, I'll give you an
14 opportunity.

15 **MR. AMATO:** Thank you. Jeffrey Amato for Panasonic
16 and Sanyo.

17 I see this a lot differently. Judge Gonzalez Rogers back
18 in the fall said that these cases are coordinated in this MDL
19 and that every -- all the parties should be participating in
20 discovery cooperatively.

21 And so we took that on its face to say that the direct
22 purchaser plaintiffs who are named in the direct purchaser
23 case should be participating in discovery in the IPP case,
24 and --

25 **THE COURT:** Did she articulate that exactly?

1 **MR. AMATO:** Well, what was articulated was that the
2 direct-action plaintiffs would be able to participate in
3 discovery from the defendants and in the class cases in the
4 same manner as if they were in the cases.

5 And so what -- but what we've said -- and we've been
6 meeting and conferring with the direct purchaser plaintiffs
7 about this -- was we'll be happy to serve a subpoena on you if
8 that will resolve the issue to bring you into the IPP case.

9 That's -- you know, we're happy -- we can do that
10 tomorrow. But as you see in the letter brief, they say that
11 that would not resolve the issue, that they would not be
12 giving downstream discovery because of its burden.

13 And I don't believe it's burdensome. This -- This is --
14 we're talking -- Let's focus in on Circuit City. This was the
15 major retailer of the products at issue in the IPP case for
16 most of the class period before Best Buy took over.

17 They sold billions of dollars of merchandise, and the
18 IPP's themselves -- their own expert -- say that empirical
19 evidence of those sales is essential to determining whether
20 there's been pass-through of the overcharges.

21 Circuit City is not a small player in this action. The
22 burden arguments must be credible for them to avoid
23 participating in discovery in the IPP action.

24 **THE COURT:** Well, I don't know what Judge Gonzalez
25 Rogers said other than what you just told me, that people

1 should cooperate. But I'm -- I feel pretty confident that
2 this question wasn't in front of her, whether the various
3 parties in their own cases should be treated as parties for
4 discovery purposes in the other -- in the consolidated cases.

5 I feel very confident she didn't reach that question and
6 that's something that she put to me in the first instance as
7 the discovery judge. So I'm not inclined to hang much on the
8 fact that she said something about cooperation or
9 consolidation upfront in the case.

10 As to the subpoena, I mean -- okay, if we had you turn
11 around and file a Rule 45 subpoena for the same information,
12 then we're back to the -- the relevance and burden issue. I
13 mean, it is a -- a much higher standard to meet when you're
14 doing Rule 45 discovery, so it's something that you would have
15 to demonstrate, Mr. Amato, in better shape than what's
16 demonstrated in the joint letter.

17 I understand joint letters are brief so you don't get to
18 get into the level of detail that perhaps you want, but these
19 are incredibly detailed discovery requests. So without me
20 understanding truly the relevance of this information to the
21 case as a whole on the IPP side and the level of burden and
22 the proportionality issues, I'm not inclined to order it at
23 this time.

24 And you don't have a Rule 45 out at this moment, so it's
25 not even ripe.

1 But that's -- If you were to do that and if it were to
2 come back to me, that's what I would be looking for. Okay?

3 **MR. AMATO:** Well, Your Honor, Jeffrey Amato for
4 Panasonic and Sanyo.

5 What we've told the direct purchaser plaintiffs that we
6 would be prepared to do, and we could do this tomorrow, would
7 be to serve a subpoena for deposition testimony from even just
8 percipient witnesses, not even a 30(b)(6) -- on the same
9 witnesses that have been designated in the DPP case for those
10 percipient witnesses to talk about their knowledge about
11 pricing practices. And they've rejected that.

12 **THE COURT:** Well, what I'm saying -- Well, because
13 you'd have to -- Well, I'm assuming what they're saying is
14 it's too burdensome. And under Rule 45, you'd have a harder
15 burden to meet.

16 So I'm going to need a better record to -- to even
17 consider ruling in your favor, Mr. Amato. And I don't have
18 that in front of me right now.

19 What I do have are these deposition notices that are
20 really detailed and that would call for very burdensome
21 information, so I would want to better understand the
22 relevance. It hasn't really been explained here other than
23 that, you know, overcharge is relevant to the IPP case.

24 Well, yeah, that's true. I accept that.

25 But it -- the inquiry is much more demanding than that.

1 **MR. AMATO:** Jeffrey Amato for Panasonic and Sanyo.

2 But it's actually -- the -- the relevant information we're
3 seeking here is about the pass-through of the overcharge, and
4 the -- the damages claimed in this case are enormous, I mean,
5 approaching a billion dollars.

6 And so we think that our burden -- the burden of putting
7 up a witness in the same MDL who's going to be sitting for a
8 deposition anyway in the direct purchaser case examined on
9 very similar topics that are -- oftentimes you're unable to
10 segregate the procurement practice -- upstream from the
11 downstream sales practices -- that's the type of information
12 we'd be looking for.

13 We don't think it's burdensome, especially in proportion
14 to this MDL where billions of dollars are at stake and the
15 witnesses would be sitting in the chairs for depositions that
16 are scheduled in the next upcoming weeks.

17 **THE COURT:** What the plaintiffs have told me are that
18 there are already 875,000 observations totaling over 133 -- 33
19 billion in commerce from other sources to illustrate the IPP
20 damage case and whether or not the overcharge was passed
21 through.

22 So again, we're back to proportionality and burden and
23 just to simply say this is a really big case and it's not that
24 hard doesn't give me enough. And I also don't have a Rule 45
25 subpoena in front of me. I'm not going to allow it based on

1 straight party discovery.

2 So if you want to go that route, you can try. But I'm --
3 I'm just trying to give you some guidance that I'm -- would be
4 looking for a Rule 45-type standard that I'd apply. And it's
5 fairly exacting. And the burden would be on the defendants
6 to -- to establish it. Okay?

7 **MR. AMATO:** Your Honor, we're happy to establish
8 that, and we'll serve a subpoena forthwith.

9 **THE COURT:** Okay.

10 So the other theory that you put forth was a little bit
11 opaque. So defendants say that the downstream data is
12 relevant to class certification on the question of whether
13 plaintiffs can establish a class-wide impact.

14 So I'm not entirely sure what you're saying, and I don't
15 want to put words in your mouth. I think I know what you're
16 arguing, but I'm not sure. And I -- I don't know whether --
17 plaintiffs are saying either because I think it was a one-line
18 throwaway response, so I need more on this.

19 Mr. Amato, why don't you start.

20 **MR. AMATO:** Yes, I'm happy to do so, Your Honor. I
21 think it's a little bit hard to understand in black and white
22 in a few sentences. But the direct purchasers in this case
23 cover a wide swath of the distribution chain for lithium ion
24 battery products. And so what you have here are first-choice
25 marketing to a distributor of Sony products.

1 You then have Circuit City little further down in the
2 chain as a retailer of electronics including Sony products.
3 And you also have direct purchaser plaintiffs that are
4 individual consumers purchasing directly from -- I'll use for
5 this example the Sony store, Sony products.

6 And what we'd like to discover is the sales practices
7 of -- I'll just use as an example Circuit City here of selling
8 the Sony products and how that affected its upstream ability
9 to negotiate lower prices from Sony downstream to its
10 consumers which would show that the sales of Sony products
11 from Circuit City to consumers was possibly at a lower price
12 than Sony itself was selling to individual consumers through
13 its own stores.

14 And what that would show would be that there was no common
15 pricing impact to Circuit City as compared to another direct
16 purchaser, an individual consumer going into the Sony store.

17 And that would defeat commonality. It would defeat price
18 impact that the direct purchaser must show to certify a class
19 here. And it would also go to typicality, of course, because
20 Circuit City and we would contend an individual purchaser of a
21 Sony product with a battery are not typical.

22 And -- And if I -- if I might continue, what the evidence
23 we believe will show and we've seen it in other cases would be
24 that Circuit City's purchasing process would be highly
25 tethered to what it would be able to sell the products for.

1 Okay?

2 So it would be able to sell the Sony products for a
3 certain price plus a margin. Also relevant would be marketing
4 development funds, rebates, other incentives that it would get
5 from Sony in order to reduce the -- the -- the price that is
6 eventually sold to consumers that those -- those incentives
7 and pricing strategies were not available or were not used in
8 the Sony store.

9 And so we think it's highly relevant to the pricing
10 impact. This has nothing to do with asserting a pass-on
11 defense. This isn't about *Hanover Shoe* which had nothing to
12 do with class actions and had nothing to do with *Comcast* and
13 being able to prove a methodology of showing class-wide impact
14 on pricing.

15 **THE COURT:** Okay. Mr. Sheanin.

16 **MR. SHEANIN:** Aaron Sheanin for the direct purchaser
17 plaintiffs.

18 I disagree with Mr. Amato. This has everything to do with
19 *Hanover Shoe*. *Hanover Shoe*, the -- In *Hanover Shoe*, the
20 Supreme Court said as a matter of policy that when a seller
21 overcharges a direct purchaser in violation of the federal
22 antitrust laws, whether the direct purchaser can or cannot
23 pass on that price does not matter. The injury occurs at the
24 time they paid the overcharge.

25 That's the key thing right there. So pass-on is

1 absolutely irrelevant. And courts in this district and
2 elsewhere have regularly said no pass -- no -- no downstream
3 is allowed.

4 Judge Spero did in *ODD*. It's been done any number of
5 times in *LCD* and *CRT* in -- by Judge Wilken in -- in *Meijer vs.*
6 *Abbott Labs*. This is very commonplace. This is the routine
7 issue.

8 The -- The issue that they're trying to raise, well, do we
9 have the same -- can we assert that the impact is common as to
10 everybody is, again, just a subset and a variation of
11 pass-through.

12 The only case that they've cited that remotely relates to
13 the class certification issue, right, can downstream sales be
14 picked up in discovery now so that they can be addressed on
15 class certification is the Eleventh Circuit's decision in
16 *Valley Drug*. And *Valley Drug* has been roundly rejected by
17 Judge Wilken in an excellent decision in *Meijer vs. Abbott*
18 *Labs*, by Judge White in the *Braintree Labs* case.

19 It's off point but factually -- assuming you were to
20 accept it for a moment, it's off point because there you're
21 talking about large defendants -- large purchasers who were
22 not the named plaintiffs and small purchasers who were and
23 trying to see, is there a difference between those two, and
24 can the small purchasers appropriately represent the large
25 ones.

1 Whereas here, you're talking about a much broader variety
2 of class plaintiffs, including, as Mr. Amato said, retailers,
3 very large ones, distributors, and individual purchasers,
4 individual consumers.

5 Now, that is the factual distinction. But as a matter of
6 law, all that gets to is the questions, once again, of
7 pass-through.

8 And -- And, as Judge Wilken said, when you look at it, it
9 ignores all of the ills that *Hanover Shoe* was trying to
10 address, which is the evidentiary complexities that would be
11 brought forward in analyzing the impact on any one particular
12 firm's profits, right?

13 It creates a long, complicated proceedings that are not --
14 that were -- may prove inconclusive or -- likely to prove
15 inconclusive, that are not relevant to these particular claims
16 even on a class-wide basis, and that it would undermine and
17 chill the deterrent effect, right, to have to go through that
18 kind of discovery, to put that kind of information in front
19 of -- as -- as a sort of side issue to make it be the central
20 issue and somehow would chill and create a deterrent effect on
21 the bringing of antitrust claims by direct purchaser
22 plaintiffs under the federal antitrust laws.

23 And that -- This court has rejected it. What they're
24 trying to do now is basically bring in through the back door
25 what they cannot bring in through the front.

1 **THE COURT:** Okay. Mr. Amato, any rebuttal on that?

2 **MR. AMATO:** Yes, Your Honor. Jeffrey Amato for the
3 Panasonic and Sanyo defendants.

4 I -- As I said in -- in my first portion of the argument,
5 this isn't about *Hanover Shoe*. This isn't about asserting a
6 pass-on defense. It's exactly about whether the direct
7 purchaser plaintiffs can establish common class-wide impact on
8 the overcharge, and whether that impact is the same to a
9 consumer or a large retailer is -- is the essential question
10 in this case at the moment.

11 And what I would suggest is that we are able to obtain
12 this discovery, which we believe it will be used in a highly
13 relevant way in our oppositions, and that judge Gonzalez
14 Rogers be given the benefit to rule on our oppositions in
15 class certification and determine for herself whether that
16 information is determinative of the question, whether it's not
17 determinative of the question, or whether it is relevant and
18 completely barred by *Hanover Shoe*, a case from 50 years ago
19 that had nothing to do with class certification or the other
20 issues we're facing in this MDL.

21 And so that would be, from my perspective, the most
22 efficient way to proceed so that judge Gonzalez Rogers isn't
23 ruling in this case on -- on a record that's incomplete.

24 **THE COURT:** So here's my view of the *Hanover Shoe*
25 question. I mean, I think everybody -- we're all in

1 agreement, *Hanover Shoe* says no pass-through defense, right?
2 So you -- defendants understand that they can't ask for this
3 information and name that as the -- as the relevant reason.
4 It's barred. Okay.

5 So over the years, there've been different attempts to
6 couch it for -- as relevant in other ways. And so -- you
7 know, I don't think I can say as a matter of law that
8 downstream data is -- is completely out of bounds. I don't
9 think there's any court that said you can never ask for
10 downstream data; it's never relevant.

11 But what the cases do seem to suggest is the following:
12 It's certainly frowned upon. And *Hanover* and *Illinois Brick*
13 both explain how in addition to the -- you know, for the
14 reasons that they reject the pass-through defense as -- as
15 being overly complicated and drawing attention away from
16 the -- diverting attention away from the existence of a
17 conspiracy. It's chilling. It can be chilling 'cause it's so
18 burdensome.

19 So we have a number of cases that have gone at this
20 including Judge Wilken in *Meijer*, Judge Corley in *Braintree*,
21 where in both of those cases, defendants put up a class
22 cert-related relevance argument.

23 This is relevant to show that there's a conflict
24 between -- there's -- you know, the plaintiffs are not typical
25 because some are going to benefit from this, some are going to

1 do better than others, or -- I think that was in both
2 *Braintree* and in *Meijer*. We have *Aspartame* where the
3 defendants argued that it would be relevant to opposing Rule
4 23 because we can ferret out issues of buying power, and
5 that's a little bit close to what you're arguing, Mr. Amato.

6 That's the same thing that was argued in *In Re Vitamins*,
7 which is discussing folding -- folding carton. Same kind of
8 argument that we want to get at certain plaintiffs having --
9 or certain plaintiffs having countervailing bargaining power.

10 That's what I'm hearing the argument to be on the defense
11 side. And so far, that argument has been rejected because
12 it's -- or the argument for discovery has been rejected
13 because the theory of relevance is pretty slim to justify what
14 is very burdensome discovery.

15 The -- The other problem is that, again, I'm looking at
16 extremely detailed discovery requests. I don't even have the
17 document requests, but the depo notices are asking for
18 individualized downstream data.

19 And in order to do that -- or to order that, I'd have to
20 look at relevance. And so far, I'm not finding -- defendants
21 have not made a case for strong relevance. There may be some
22 relevance. I'll grant that. There may be some relevance to
23 class certification.

24 But you'd to have balance that with the rest of the
25 factors that are in 26(b), proportionality, burden, resources,

1 other ways to get this information. And there's been no
2 attempt to do that.

3 So I -- I don't see on this record that I -- you know,
4 that there's grounds to order it.

5 But I see that Mr. Black wants to say something.

6 **MR. BLACK:** I do, Your Honor. So Andrew Black again
7 for Toshiba Corporation.

8 So there's a couple of unique issues here that I think
9 haven't been addressed that I'd like to quickly address with
10 the court.

11 First of all, the data is relevant with respect to
12 retailers such as Circuit City because the actual purchase
13 price cannot be established without the downstream data. That
14 is because there are numerous levels of chargebacks, MDF's
15 that are linked as either percents or a return that is a
16 per-product sale. We'll give you \$5 back for every unit you
17 sale -- you sell. That's not --

18 **THE COURT:** Mr. Black, I'm going to stop you. I'm
19 going to need you to go slower because this --

20 **MR. BLACK:** Sure.

21 **THE COURT:** Explain this to me --

22 **MR. BLACK:** Sure.

23 **THE COURT:** -- as if you're explaining to someone who
24 does not have any knowledge of this, and you'd be pretty close
25 to --

1 **MR. BLACK:** Okay. So --

2 **THE COURT:** -- to reality. So why -- when you say,
3 we can't figure out the purchase price, what purchase price
4 are we talking about?

5 **MR. BLACK:** The purchase price so --

6 (Simultaneous colloquy.)

7 **THE COURT:** -- from defendants to --

8 (Simultaneous colloquy.)

9 **THE COURT:** -- sorry --

10 **MR. BLACK:** Circuit City.

11 **THE COURT:** Okay.

12 **MR. BLACK:** Because when -- when prices are
13 negotiated for purchasing, there's also built in oftentimes a
14 percentage chargeback. It's either -- as a percentage of the
15 sale price or as a fixed dollar amount per unit sold.

16 Now, that is not in the purchase data. And so without the
17 sales data, you can't know what the actual purchase price is.
18 And these are significant numbers. I mean, we're talking --

19 **THE COURT:** So, Mr. Black, again, I'm going to stop
20 you. This -- None of this is in the brief.

21 **MR. BLACK:** It is mentioned, I believe, in the -- in
22 the brief. You know, we only had two and a half pages, so
23 it's -- it's short, but it is I believe touched upon in the
24 brief.

25 The other -- The other thing I would say in terms of the

1 burden, Your Honor, is that with respect to Circuit City,
2 there is no burden because this data's already collected.
3 They have it sitting, you know, right there ready to be
4 produced, and they haven't -- and so there is no actual burden
5 in terms of collecting the data.

6 **THE COURT:** Are we talking about information from
7 *LCD*?

8 **MR. BLACK:** We're talking about information from *LCD*
9 that -- that these -- that plaintiffs do have in their
10 possession, that Circuit City has -- I mean, they're --
11 they're the party from *LCD*, and they're the same products at
12 issue.

13 So the data's already collected --

14 **THE COURT:** So let me just say -- So that's not
15 before me, but for your meet-and-confer going forward, right,
16 about these documents in *LCD* and whether they should be
17 produced, if -- again, if they show -- if they help establish
18 the purchase price, which would be important on the merits,
19 and they've already been collected, then it may be that, you
20 know, they need to be turned over.

21 Again, I'm just trying to give you some guidance. I'm not
22 making rulings because I don't know the particulars. You're
23 going to have to put them before me.

24 **MR. BLACK:** Sure.

25 **THE COURT:** But I want to give you whatever guidance

1 I can that you can implement on the next few days. This is a
2 new argument.

3 The argument is purchase price from the defendant to
4 Circuit City is going to be important, and we can't
5 necessarily know the purchase price without some other
6 information which is already collected.

7 Mr. Sheanin, if that's the argument, you know, that's a
8 different argument. But there, the -- the burden is less
9 because it's been collected. Okay?

10 So I don't know how I would -- how I personally would come
11 out as the judge in weighing those things, and I'm not going
12 to come out on it today because you need to flesh this out.
13 I'm not going to hear the argument because it wasn't made --

14 (Simultaneous colloquy.)

15 **MR. SHEANIN:** May I respond to the two brief points
16 that Mr. Black made?

17 **THE COURT:** Very briefly.

18 **MR. SHEANIN:** Yes.

19 First of all, I find it very surprising to hear that
20 defendants have no idea what Circuit City or others paid for
21 lithium ion batteries and lithium ion battery products from
22 their purchases from the defendants because it's in
23 defendants' own transactional data. They have it. They know
24 what they sold it for. They gave it to us already. And they
25 cannot run their businesses without knowing that.

1 **THE COURT:** Okay.

2 **MR. SHEANIN:** That's --

3 **THE COURT:** So -- So, again, in Rule 26(b), you look
4 at availability of information to the parties. So that's
5 one -- one of their arguments that you'd make.

6 If you already have it, you don't really need it; it's
7 only to confirm it.

8 **MR. BLACK:** That's not accurate.

9 **THE COURT:** Well, that's something you'll have to
10 talk through, and that's something that I would consider in
11 looking at 26(b).

12 **MR. BLACK:** Okay.

13 **THE COURT:** What's your second part?

14 (Simultaneous colloquy.)

15 **MR. SHEANIN:** You know what, I'll stand down on my
16 second point.

17 **THE COURT:** Okay.

18 **MR. SHEANIN:** Thank you, Your Honor.

19 **MR. BLACK:** Briefly on the depositions, I would just
20 say that, you know, the depositions are next week, and in
21 terms of the -- the burden, it's also the case that the sales
22 information is directly related to the purchase.

23 So when -- when a purchase is done -- what we're afraid of
24 as part of this is that any ruling against -- not -- you know,
25 disallowing a witness to talk about sales is going to preclude

1 us from getting accurate information about purchases.

2 Because the way purchasing were done -- and we know this
3 because we have the benefit of having deposed Circuit City
4 many times before -- the way purchasing is done is that
5 Circuit City looked at what it thought it could sell a -- sell
6 a product at, and then it said, I'm willing to buy it for this
7 price because I'm going to be able to make this much on it.

8 So if we're put in a situation where we can't fully talk
9 about purchasing, that's a problem for us. And we're not
10 asking them to provide any information that's going to be
11 overly burdensome.

12 The witness that they put forward is -- is a buyer and was
13 later the -- the head of their -- one of their merchandising
14 divisions. He was the individual who set both the sale price
15 and the purchase price. He has personal knowledge of this,
16 and it's not going to be burdensome to ask these questions of
17 him.

18 These are -- These are things that are going to go to how
19 purchasing was done, and that's -- that's the focus -- there
20 is sales -- there is a sales aspect, but what we don't want to
21 happen is not to be able to fully ask about purchasing because
22 they're interrelated.

23 **THE COURT:** Is there a problem with asking about
24 purchasing, Mr. Sheanin?

25 **MR. SHEANIN:** Certainly, there's no problem asking

1 about purchasing. We're prepared to testify about that.

2 (Simultaneous colloquy.)

3 **MR. BLACK:** It's not talking about --

4 **MR. SHEANIN:** Mr. Black --

5 **MR. BLACK:** Sorry. Apologies.

6 **MR. SHEANIN:** We do have the -- We do recognize that
7 there are certain areas where there is some relationship
8 between purchasing and sales. And I am not going to instruct
9 my witness to absolutely refuse to respond to any such
10 question that might touch upon sales if it's really about
11 purchasing.

12 **THE COURT:** Okay.

13 **MR. SHEANIN:** On the other hand, Your Honor, if it's
14 really something that is a sales discussion -- and I've read
15 through the deposition transcripts in prior -- CRT and LCD,
16 and I know that the vast majority of that pertained to sales,
17 what were your pricing practices, what were your sales
18 practices, et cetera. That, I think, is off limits, certainly
19 based upon what this court's ruling has been today.

20 And if that's the case, then, yes, I think it's
21 appropriate for me to instruct not to answer to the extent
22 that it complies with this court's order.

23 **THE COURT:** So to summarize, next week, there will be
24 questioning about purchasing, and that is fair game.
25 Everybody agrees.

1 Mr. Sheanin has just said that there may be questions that
2 go beyond the strict confines of what we think of as
3 purchasing but that are relevant -- materially relevant to
4 purchasing and that those questions are going to be allowed.

5 But if they're outside the bounds, reasonable bounds --
6 reasonable bounds of what's irrelevant to purchasing, then
7 it's not relevant to purchasing, and you may instruct because
8 the -- there's -- if -- it's -- it's more about downstream
9 activity.

10 So have I captured what you said accurately?

11 **MR. SHEANIN:** Aaron Sheanin for the record.

12 Yes, I believe you have, Your Honor.

13 **THE COURT:** Okay. So as to the motion in front of me
14 today, here's the problem. The argument -- Well, I think we
15 just cleared up that argument, Mr. Black. Okay?

16 But as to the very broad requests to depose at length next
17 week on individualized downstream data, the defendants have
18 not made their case because they haven't established, you
19 know, a -- either a high level of relevance or -- well, they
20 haven't -- they have to show that it falls within 26(b), that
21 it is relevant and proportional.

22 So I'm seeing marginal relevance maybe to a class
23 certification issue, although it's not entirely clear, and
24 certainly no attempt to tailor these to make them
25 non-burdensome and get at exactly what you might need for the

1 relevance that you've articulated.

2 Had you not gone for broke and tried to do something more
3 tailored, then this -- this might be a different outcome, but
4 what I have in front of me are very broad discovery requests.

5 **MR. AMATO:** Jeffrey Amato for the defendants. I'd
6 like to say two things.

7 First, on that point right there, we actually negotiated
8 with the direct purchaser plaintiffs for months about how to
9 tailor the downstream information we needed both in documents
10 and -- and in testimony. And we thought we were very close to
11 reaching an agreement where only percipient witnesses who had
12 knowledge of the downstream information would -- would be
13 giving general answers about the pricing practices that --
14 that were relevant to the DPP case and that touch on some of
15 the pass-through issues in the IPP case.

16 And so that process came to a halt very abruptly, I would
17 say, in -- in March when the clock was really -- started to
18 ticking down on our ability to get information that we could
19 use in our class oppositions.

20 And so that's when we issued I guess what you would call
21 as a go-for-broke subpoena request. But there were attempts
22 to be made, and we were leading down that path --

23 **THE COURT:** But here's the problem.

24 **MR. AMATO:** Then they shut the door on that.

25 **THE COURT:** Okay. Well, so the -- things fell apart,

1 and, as you said, you issued a "go-for-broke" subpoena, which
2 is problem.

3 Had you made a request that was tailored to what you could
4 show to be relevant, then you'd have a much better shot at
5 convincing me that it falls within the scope of 26(b).

6 But I don't see that here. You didn't say, well, we would
7 settle for the following compromise. We need this, and this
8 is why we need it, we need it from these individuals, so on
9 this record, I can't rule in your favor.

10 **MR. AMATO:** Well, Your Honor, I would submit that in
11 a case where Circuit City is claiming hundreds of millions of
12 dollars of damages and the -- and the damages in the expert
13 reports quantify the direct case at -- approaching a billion
14 dollars, I would think that having a witness prepare to sit
15 under the time limits in the deposition protocol where we
16 could fit in some questioning about downstream issues that are
17 relevant to pricing of the products that were purchased from
18 the defendants, I don't see that as burdensome at all.

19 And I'd like -- I would just like, if you could give me a
20 moment, about what Mr. Sheanin said about allowing some
21 inquiry to downstream issues that are, you know, related to
22 purchases.

23 Just last week, Ritz Camera sat for a deposition. This
24 question was asked: Did Ritz ever determine the price at
25 which it wanted to sell a product before deciding how much it

1 was willing to pay for a product?

2 That question, the witness was instructed not to answer.
3 And we could not obtain that testimony.

4 That -- And we believe that that information about how
5 Ritz Camera would negotiate the price it purchased the product
6 is directly relevant to the direct purchaser case.

7 **THE COURT:** Mr. Sheanin?

8 **MR. SHEANIN:** Couple of things. One is I disagree
9 with Mr. Amato's characterization of the meet-and-confer, but
10 I will put that aside.

11 **THE COURT:** Okay.

12 **MR. SHEANIN:** To -- With respect to Ritz Camera, I
13 think that the plaintiffs were waiting to see where this
14 court's ruling was going to be and trying to understand where
15 we were.

16 We had a reasonable basis to make those instructions and
17 objections based upon the motion for protective order that we
18 had filed, and we were standing on it.

19 We've had this discussion here before Your Honor today. I
20 think if I were to have a conversation with Ritz Camera's
21 counsel and -- and be in that deposition if it were to take
22 place now, I would say, look, a little more latitude is
23 necessary.

24 In the event, after the deposition of Circuit City, that
25 the defendants say that they really want to take that very

1 small, I think, modest amount of testimony on Ritz Camera, I'm
2 happy to discuss that with Ritz Camera's counsel to see what
3 can be done.

4 But I would suggest that it be done probably, one,
5 telephonically to avoid everybody having significant problems
6 of trying to haul everyone back in place. And, two, in a very
7 limited manner to -- you know, no more than an hour, probably
8 less, of that kind of testimony. But I'm prepared to have
9 that kind of negotiation, though I do think it probably makes
10 more sense to get through Circuit City's deposition first.

11 **THE COURT:** Okay.

12 So, Mr. Amato, at the -- you know, Mr. Sheanin explained
13 that there's not going to be an instruction that draws it that
14 close when Circuit City is -- is deposed, and I think that's
15 appropriate.

16 As to any disagreements about what Ritz Camera did, meet
17 and confer on it, and try to set up a way -- 'cause I think if
18 that issue were put in front of me and if that question is --
19 I think -- did you read it or were you --

20 **MR. AMATO:** Yes, I read it from the record.

21 **THE COURT:** Okay. So that is a problematic
22 instruction, and -- but I -- I would want the parties to work
23 out a reasonable way to get a further answer for your client,
24 Mr. Amato.

25 So telephonically and, you know, we're not going to reopen

1 everything to everything else. But the reasonable,
2 not-too-burdensome way of creating an opportunity for you to
3 get answers to questions that were properly asked is -- is in
4 order.

5 Okay?

6 **MR. AMATO:** Thank you.

7 **THE COURT:** Is there anything further?

8 So my ruling today, just to be clear is -- I made some
9 rulings about a deadline for meeting and conferring on some
10 outstanding issues and getting papers in front of me if
11 there's a remaining problem.

12 I ruled that -- I'm not going to require the DPP's in this
13 case to produce downstream data in order to support the
14 pass-through case for the IPP's.

15 I'm also going to -- I'm also ruling that the downstream
16 data, as presented here, will not be compelled because the
17 defense failed to establish more than, you know, a modicum of
18 relevance to their argument about class certification and that
19 what they're requesting is very burdensome and out of
20 proportion and there was no attempt to try to tailor it to the
21 reasons they -- they said they needed it for.

22 We had some discussion about the depositions for next week
23 and how the questioning needs to account for the fact that
24 some of the lines are a little blurry around what purchasing
25 is.

1 And we talked about what to do about the Ritz instruction
2 in last week's deposition.

3 Okay? Is there anything further?

4 **MR. BLACK:** Your Honor, I had one question as to how
5 this pertains to percipient depositions.

6 Andrew Black, again for Toshiba Corporation.

7 **THE COURT:** Okay.

8 **MR. BLACK:** If it's in the witness's personal
9 knowledge, I mean, is it appropriate for counsel to instruct
10 the witness not to answer if the witness knows on his own -- I
11 understand the ruling as to the 30(b)(6).

12 **THE COURT:** I personally would not see a distinction
13 between -- about where you draw that line for percipient
14 versus 30(b)(6) depositions.

15 Mr. Sheanin, do you have argument --

16 **MR. SHEANIN:** Aaron Sheanin for the record.

17 No, I agree with Your Honor. I don't see a distinction
18 between those two. And, again, to me, it's trying to get in
19 through back door what they can't get in through the front.

20 **THE COURT:** Well, I guess I heard the question a
21 little differently.

22 If you're asking a percipient witnesses about purchasing
23 and something goes a little beyond purchasing but is fairly
24 related to purchasing, you're asking, can I ask -- is it okay
25 to go ahead and ask the question if it's not a 30(b)(6).

1 **MR. BLACK:** Yes, Your Honor.

2 **MR. SHEANIN:** Okay. As to that, that's fine, Your
3 Honor.

4 As to can I ask questions about sales of a percipient
5 witnesses, to me, that falls within the line of what we've
6 previously discussed here, and it would be off limits.

7 **THE COURT:** Correct. What my ruling is that I'm not
8 drawing distinctions between percipient and 30(b)(6)
9 witnesses. If it's prohibited discovery for 30(b)(6), it's
10 prohibited for a percipient. If it's allowed for 30(b)(6),
11 it's allowed for percipient. Okay?

12 Mr. Black, does that answer your question?

13 **MR. BLACK:** It does, Your Honor. I guess I see a
14 distinction on the -- the burden if the witness already knows
15 the answer, but -- but I take Your Honor's point.

16 **THE COURT:** Right. Okay.

17 **MR. SHEANIN:** Your Honor, one quick point on the
18 meet-and-confer deadlines and the filing of motion, we
19 originally set Wednesday for I think both the downstream
20 issue -- or the CRT/LCD productions, as well as cost plus,
21 et cetera. And then there was a discussion about Friday.

22 I think it may make sense to move both of those to Friday
23 just because we'll be in deposition and either we'll get
24 through this or we won't, but it should all go in one shot.
25 Is that --

1 **MR. AMATO:** I think we're fine with that. We'll be
2 in the deposition as well, so --

3 **THE COURT:** Okay. So Friday's the deadline for all
4 of those disputes to come to me if they're not worked out.
5 Okay?

6 **MR. BLACK:** Thank you, Your Honor.

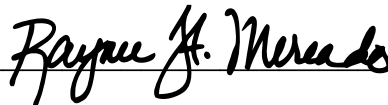
7 **THE COURT:** All right. Thank you all.

8 (Proceedings were concluded at 12:40 P.M.)

9 --o0o--

10
11 CERTIFICATE OF TRANSCRIPTION OF ELECTRONIC RECORDING

12
13 I, RAYNEE H. MERCADO, hereby certify that the
14 foregoing is a true and correct transcription to the best of
15 my ability, of the above pages, of the official electronic
16 sound recording provided to me by the U.S. District Court,
17 Northern District of California, of the proceedings taken on
18 the date and time previously stated in the above matter.

19
20 

21 Raynee H. Mercado

22 Friday, April 29, 2016